

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 460 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE D.G.KARIA

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1. Whether Reporters of Local Papers may be allowed
to see the judgements? yes

2. To be referred to the Reporter or not? no

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3. Whether Their Lordships wish to see the fair copy
of the judgement? no

4. Whether this case involves a substantial question
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder? no

5. Whether it is to be circulated to the Civil Judge?
no

BAI SOMI WIFE OF MAGAN MAFA

Versus

STATE OF GUJARAT

Appearance:

Ms.Shilpa R.Shah,Amicus Curiae for the Petitioner.

Mr.N.N.Pandya, Addl.Public Prosecutor, for the Opponent.

CORAM : MR.JUSTICE D.G.KARIA

Date of decision: 04/03/96

ORAL JUDGEMENT

This Revision Application under section 397 read with section 401 of the Code of Criminal Procedure, 1973 is directed against the judgment and order dated July 25, 1983 passed by the learned Addl. Sessions Judge, Mehsana, confirming the conviction of the petitioner for the offence under section 379 of the Indian Penal Code. The learned Judicial Magistrate, First Class, Kalol, by his judgment and order dated April 30, 1982, held the petitioner-accused guilty for the said offence under section 379 of the Indian Penal Code and convicted and sentenced her to undergo rigorous imprisonment for two years and to pay a fine of Rs.5,000/-, in default to undergo further rigorous imprisonment for nine months. The learned Magistrate further ordered that out of fine, if paid, the amount of Rs.4,000/- be paid by way of compensation to the complainant, Bai Mani. The petitioner herein, had preferred Criminal Appeal No.45 of 1982 in the Sessions Court at Mehsana against the said order of conviction and sentence. By the aforesaid judgment and order of the learned Addl. Sessions Judge, Mehsana, the appeal was partly allowed, confirming the conviction, but reducing the sentence from rigorous imprisonment for two years to rigorous imprisonment for one year and to pay a fine of Rs.2,000/- in default to undergo further rigorous imprisonment for six months. The order as regards compensation was also modified and substituted by payment of Rs.1750/- to the complainant, Bai Mani, instead of Rs.4,000/-. The said judgment and order passed by the learned Addl. Sessions Judge, Mehsana, is under challenge in the present Revision Application.

The aforesaid Revision Application was filed by Shri B.C.Patel (now the Hon'ble Judge of this Court), who was practising then, and on his elevation to the Bench, the office had issued notice to the petitioner on March 24, 1994 asking her to appoint another Advocate in the matter or to remain present before the Court, etc. However, the said notice was returned unserved with the remark that the petitioner has not been residing at the given address and there is no moveable or immoveable property nor her present whereabouts are known. Under the circumstances, it is extremely difficult to trace the whereabouts of the petitioner. Ms. Shilpa R. Shah, learned Advocate was therefore requested to assist the Court in the matter and the matter was finally heard and is being disposed of.

It is the prosecution-case that P.W.1, complainant, Bai Mani, had boarded S.T. Bus at about 1.00 p.m. on November 3, 1980 at Kalol, as she wanted to

go to Pethapur in Gandhinagar Taluka. She had put on a golden necklace weighing about one-and-a-half tolas with pendente in it. The bus was crowded as many more passengers were in it and it was fully packed. It is alleged that p.w.1 complainant Bai Mani was followed by one woman who was accompanied by two other women while boarding the said bus. Complainant, Bai Mani, after boarding the said bus, stood near the seat of the Conductor, as there was no berth for sitting. Suddenly, she found that her golden necklace was lost. She raised hue and cry, when the bus had left Kalol Depot. The petitioner-accused is alleged to be standing behind the complainant, Bai Mani. It is alleged that the accused had removed the said necklace from the neck of the complainant, Bai Mani, and handed it over to two other women who are said to be accompanying the petitioner-accused. It is the prosecution-case that the said two women had got down from the bus at Kalol Bus Stand itself.

It is also the case of the prosecution that Bai Mani was crying on account of loss of her golden necklace worth Rs.2800/- and as such the accused tried to console her and hence Bai Mani felt that the accused would have committed theft of her golden ornament, and P.W.2 Mahadevbhai Exh.11 told the accused that having stolen the necklace why should she console and pacify the complainant. The petitioner thereupon rebuked the said P.W.2 Mahadevbhai for alleging against her and involving her falsely. The said bus had thereafter arrived at Pethapur at about 2.00 p.m. on that day and it was taken to Pethapur Police Station where the complainant Bai Mani lodged her complaint Exh.9 for the offence against the present petitioner of having committed theft of complainant's necklace. The Police investigated the offence registered at C.R.No.301/80 and on completion thereof, the charge-sheet was filed against the petitioner-accused, Bai Somi.

Charge Exh.3 for the aforesaid offence of theft under section 379 of the Indian Penal Code was read over to the petitioner and thereafter she pleaded not guilty. After recording the evidence of the prosecution witnesses and on appreciation thereof and other material on record, the learned Magistrate at Kalol convicted and sentenced the petitioner as aforesaid. The appeal was partly allowed as stated above.

Ms.Shilpa R.Shah, learned Advocate who was appointed as Amicus Curiae, has taken me through the impugned judgment and the evidence on record. I have

gone through the records and proceedings. In her submission, Ms.Shah contended that there is no reliable evidence that the accused knew the two ladies who are said to have accompanied the accused, nor there is any evidence whatsoever on the record to connect the accused with the said two ladies. Conduct of the accused to console the complainant when she was weeping on account of loss of her golden necklace was obvious in nature. Ms.Shilpa R.Shah submitted that there is total misreading of the evidence on record and as such requested this Court to go through the evidence which would not otherwise be necessary in dealing with or disposing of the Criminal Revision Application.

On perusal of the evidence on record, I see substance in the submission of Ms.Shah, learned Advocate appointed for the petitioner. It is an admitted position on record that the complainant, P.W.1, Bai Mani, did not know about the loss of her golden necklace till the bus left Kalol Bus Stand. It is somewhere in midway when it was noticed by Bai Mani that her golden necklace was missing. It is, therefore, clear from the record that while boarding the bus, if the accused had removed the golden necklace from the neck of the complainant and handed it over to the other two ladies who are said to have got down from the bus at the Kalol Bus Stand, the accused would have also got down at Kalol Bus Stand. It is also an admitted position that the bus was packed and overcrowded. So far as the evidence of the complainant, p.w.1 Bai Mani is concerned, what she has stated is that she lost her golden necklace and that she had not seen anybody removing the golden necklace from her neck. Therefore, the complainant, Bai Mani, had no personal knowledge about the actual commission of the crime in question. At this stage, if the complaint at exh.,9 is seen, it is mentioned therein that the necklace was removed from the neck of the complainant while she was boarding the bus and she raised hue and cry, but the bus had left Kalol. Her evidence is contrary to the complaint at exh.9, inasmuch as she has deposed that she came to know about the missing of the necklace from her neck only when the bus had left Kalol Bus Depot. There is also merit in the submission of Ms. Shilpa R.Shah that there is no evidence on record to show that the accused Bai Somi had any connection with the other two ladies who are said to have accompanied the accused. There is no investigation carried out to know the whereabouts or other details of the other two ladies who had got down from the bus.

Both the Courts below have placed much reliance

on the evidence of P.W.2 Mahadevbhai Laljibhai Desai, who was a Teacher for about 35 years then. P.W.2 Mahadevbhai deposed at Exh.11 that he was also travelling in the said bus and had seen the right hand of the accused Bai Somi on the shoulder of the complainant Bai Mani and he had seen the accused giving the necklace to other ladies. Curiously enough, he did not intervene at that time and believed that the accused would be acquainted or would be travelling with the complainant and as such she might have taken the necklace from her neck. When the complainant raised hue and cry, then only he disclosed this fact. Thus, the conduct of P.W.2, Mahadevbhai, is quite strange, inasmuch as he does not stop the accused at the time of alleged removal of necklace from the neck of the complainant. In para 14 of the trial court's judgment, it is stated that it was submitted on behalf of the defence that several new things were added and the entire prosecution case was altered by the version of p.w.2. The learned Magistrate discarded this submission on behalf of the petitioner on the ground that the statement was recorded by Pethapur Police Station and the offence was committed within the jurisdiction of Kalol Police Station and as such the statement of P.W.2 wherein all these material things were stated and which are contrary to his deposition would not be relevant. It is clear that the statement of P.W.2 is not consistent with his evidence before the Court. He has tried to introduce altogether a new case at the time of his deposition. Discarding this on the ground that statement of p.w.2 was recorded by Pethapur Police Station and as such was not relevant would not be proper and sustainable.

In her statement under section 313 of the Code of Criminal Procedure, the accused has stated that she was accompanied by her daughter named Hansa, aged about 7 years, and on account of rush in the bus, she had placed her daughter on her wrist. If it were so, it was not possible for the accused to keep her right hand on the shoulder of the complainant. Apart from this improbability, the complainant has not stated either in the complaint or in her deposition that the accused had kept her hand on her shoulder. Thus, reading the evidence of p.w.2 carefully, it does not inspire any confidence, inasmuch as it is inconsistent with the police statement recorded at Pethapur Police Station. Both the Courts below have just ignored the further statement of the accused under section 313 of the Code of Criminal Procedure. In the facts of the case, the finding of the lower Appellate Court that the evidence of Mahadevbhai, p.w.2, is truthful and worthy of credence cannot be sustained, inasmuch as it is Mahadevbhai who

has admitted in his cross-examination that he did not state before the police while recording the statement that the right hand of the accused was on the shoulder of the complainant and that he had told the accused that having stolen the necklace why should she console the complainant on loss of her golden necklace. In view of these material contradictions and omissions, one would fail to appreciate as to how p.w.2 Mahadevbhai can be said to be a truthful and reliable witness. Simply because the accused belonged to a particular community of Vaghri, it cannot be assumed that she would have committed theft of the golden necklace. In the facts of the case, it is not established beyond reasonable doubt that the petitioner-accused intended to take away the golden necklace from the person of the complainant dishonestly and thereby committed theft of it. Admittedly, the muddamal necklace was not seized or recovered from the accused nor from the other two ladies. At the earlier point of time, the case of the complainant appears to be that she had lost the golden necklace while boarding the bus. In this view of the matter, the conviction and sentence imposed on the petitioner-accused cannot be sustained

Before parting with the judgment, it would be just and proper to record a word of appreciation for the assistance that Ms. Shilpa R. Shah, learned Advocate, rendered to this Court in going through the impugned judgments and the entire record and then pointing out the inherent infirmities and discrepancies in the impugned judgments of the Courts below.

In the result, the Revision Application is allowed. The impugned judgments and orders of both the Courts below are quashed and set aside. The petitioner-accused is acquitted of the offence with which she was charged. Her bail-bonds stand cancelled. Fine, if paid, is ordered to be refunded to the petitioner-accused. Rule is accordingly made absolute.
